

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WESLEY PAUL READ

Claimant

VS.

CITY OF WICHITA

Respondent,

Self-Insured

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Docket No. 241,528

ORDER

Respondent appealed the January 3, 2000 Award entered by Administrative Law Judge Jon L. Frobish.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges injury to the right elbow from repetitive mini-traumas. In the Application for Hearing that claimant filed with the Division of Workers Compensation on January 28, 1999, claimant alleges a date of accident "06-98 and every working day thereafter through present."

The Judge found that claimant's date of accident should be March 1, 1999, and awarded claimant a seven percent permanent partial disability to the right arm.

Respondent contends Judge Frobish erred. The issues raised in respondent's application for Appeals Board review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, what is the date of accident?

Unfortunately, respondent did not file either a letter or brief with the Appeals Board within the allotted time. Therefore, the Board does not have the benefit of respondent's arguments and contentions, except for those contained in its December 17, 1999 letter to the Judge.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. For the last several years, claimant has worked for the City of Wichita. Before claimant began working for respondent, he had worked a number of years for the Metropolitan Transit Authority.
2. Claimant alleges that he injured his right elbow beginning in June 1998 at which time he was working for the respondent as a mechanics' supervisor. In that job, claimant performed and supervised the general maintenance and repair of the city's buses. Despite having soreness in his elbow, claimant continued to work. His symptoms worsened. During the early stages of symptoms and continuing over the next several months, claimant spoke with his supervisor about his elbow. Notice of the injury is not an issue.
3. In September 1998, claimant saw his family physician who referred him to another physician at the Wichita Clinic. At the Wichita Clinic, claimant received an injection in his elbow.
4. In January 1999, claimant injured his left wrist or thumb and began receiving treatment from Dr. Morris for that injury. In March 1999, Dr. Morris began treating claimant's right elbow. Dr. Morris offered claimant both surgery and formal medical restrictions for his elbow. But claimant declined surgery because he was able to tolerate the symptoms. And claimant declined the formal medical restrictions because he could modify his work duties and, more importantly, he did not want any restrictions on paper. Nonetheless, the doctor told claimant to avoid activities that hurt his elbow. Although the record is not entirely clear, it appears that claimant last saw Dr. Morris for his elbow in April 1999.
5. Presently claimant's elbow symptoms are tolerable. Certain activities cause the elbow symptoms to flare up, but claimant self-treats with stretching exercises and a TENS unit. As of the October 1999 regular hearing, claimant continued to work for the city at the same job. Work disability is not an issue.
6. At his attorney's request, claimant saw Dr. Pedro A. Murati for an evaluation and impairment rating. Dr. Murati evaluated claimant in July 1999 and diagnosed right elbow pain with signs and symptoms of posterior interosseous nerve entrapment, which the doctor rated at seven percent to the upper extremity according to the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*. That is the only functional impairment rating in the record. The Appeals Board affirms the Judge's finding that claimant has a seven percent functional impairment to the right upper extremity as a result of his work.

CONCLUSIONS OF LAW

1. The Award should be affirmed.
2. The Appeals Board affirms the Judge's finding and conclusion that claimant injured his right elbow while working for the respondent and that the accidental injury arose out of and in the course of employment.
3. Following creation of the bright line rule in the 1994 *Berry*¹ decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,² which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.³

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.⁴

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

¹ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

² *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

³ *Treaster*, syl. 3.

⁴ *Treaster*, syl. 4.

4. Because claimant continues to work for the city in the same job, the facts do not fit neatly into a *Treaster* analysis. The Judge found that the appropriate date of accident in this proceeding was approximately March 1, 1999. The Appeals Board affirms that finding.

The evidence indicates that claimant did not seek medical treatment for his elbow from September 1998 until he began receiving treatment from Dr. Morris sometime in March 1999. Therefore, the Board concludes that claimant continued to perform activities at work that were causing him additional trauma and injury through that date. There is no evidence that claimant's condition worsened after he began treating with Dr. Morris, but there is evidence that claimant advised the doctor that rather than accepting formal work restrictions, he would control the work that he was doing to avoid additional problems. In a manner of speaking, claimant could accommodate his injury by delegating work to others.

The Appeals Board finds and concludes that claimant self-accommodated his elbow injury by changing the job duties that he performed. Therefore, the Board concludes that by March 1999 claimant decreased the offending activities that he performed and that such decrease would constitute the substantial change in job duties contemplated in *Treaster*. Under these unique facts, March 1, 1999, is the appropriate date of accident and best fits the *Treaster* principles.

5. Based upon the above, claimant is entitled to receive benefits for a seven percent functional impairment to the right arm.

6. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the January 3, 2000 Award entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS

Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director